STATE OF MINNESOTA | Filed in District Court State of Minnesota | **DISTRICT COURT**

COUNTY OF WASHINGTON | Feb 18 2020 3:08 PM | **TENTH JUDICIAL DISTRICT**

State of Minnesota,

Plaintiff,

OMNIBUS HEARING ORDER

v.

Brian Jeffrey Krook,

Dist. Court File No. 82-CR-19-2887

Defendant.

The above-entitled matter came on for Omnibus Hearing before the Honorable Mary A. Yunker, Judge of District Court, on September 30, 2019 at the Washington County Government Center in Stillwater, Minnesota, with final submissions filed January 17, 2020.

REPRESENTATION:

Thomas B. Hatch and Andrew R. Johnson, Special Assistant Washington County Attorneys on behalf of the State of Minnesota

Kevin J. Short and Paul C. Engh, Attorneys at Law on behalf of Defendant Brian Jeffrey Krook, who was present.

Based upon the testimony adduced at the Omnibus Hearing,[1] exhibits received at the hearing and subsequently by stipulation, and the arguments of counsel, the Court herewith makes the following:

[1] A document titled "Affidavit of Richard Dusterhoft" was filed December 31, 2019 without proof of stipulation. Because later submitted testimony was not subject to cross-examination per Minn. R. Crim. P. 11.03(a), and because the record was left open for stipulated evidence only, the document is not properly part of the record and was not considered. Similarly, though cited in Defendant's November 25, 2019 "Motion to Dismiss," the State's September 29, 2019 extra-record *ex parte* communication with the court, unread and rejected, is not a part of this record and has not been considered.

FINDINGS OF FACT

1. On April 12, 2018, shortly after midnight, Washington County Sheriff's Office deputies were dispatched to investigate the 911 report of a suicidal male at a residence located in Lake Elmo, Washington County, Minnesota. The initial information indicated the male, named Benjamin, was sitting in a truck with a gun.

2. Responding deputies wore full Washington County Sheriff uniform, were armed with Glock .45 caliber service handguns, wore activated body cameras[2] and drove marked and unmarked police vehicles equipped with squad cameras, service rifles and other emergency equipment.

3. Deputy Joshua Ramirez arrived first. As he neared the identified address he saw an adult male kneeling in the crosswalk of a T-intersection pointing a gun to his head. Deputy Ramirez parked his fully marked squad car with the headlights pointed toward the man, drew his service sidearm, crouched behind the open driver's door and called to the man to drop his gun.

4. Deputy Ramirez conducted an approximately 40 minute exchange with the man, later identified as Benjamin William Evans, date of birth 11/16/1994, ordering him to drop his gun and encouraging him to end the incident without harm to himself or emergency responders. Mr. Evans engaged with Deputy Ramirez, identified himself as an emergency responder aware of the tactics being used, expressed distress about a girlfriend and stated more than once it was not his intent to harm the officers. Mr. Evans remained on his knees or squatting in the middle of the road during the entire exchange, with the gun pointed to his head, his finger on the trigger, except for brief intervals when he pointed the gun to his chest. Mr. Evans turned his head and upper body frequently, as if to check to the side and rear of his position. Each time he turned, the muzzle of the gun moved in tandem and was aligned at times toward the officers. Mr. Evans did not obey repeated commands to drop his gun but did eject and toss away the magazine, causing the deputies to conclude toward the end of the exchange the gun likely contained one round only.

5. Other officers arrived as Deputy Ramirez negotiated with Mr. Evans, including Washington County Sheriff's Deputies Michael Ramos, Joshua Hutchins, John Stringer, Brian Jeffrey Krook (Defendant herein) and Deputy Sergeant Michelle Folendorf.[3] Deputies Ramos and Hutchins drew their service rifles and positioned themselves on the passenger side and to the rear of Deputy Ramirez's squad car.

---

[2] Sgt. Folendorf neglected to wear her body camera, used Defendant's body camera for a short period, then returned it to Defendant. Defendant was wearing an activated body camera just prior to and during the times he fired his weapon.

[3] Grand Jury Exhibit 6, the Report of Stuart Robinson, indicates additional Washington County deputies, Woodbury and Oakdale police officers and a Minnesota State Trooper responded to this incident, and citizen witnesses were also present. Neither testimony from, nor video or photographs related to, other witnesses at the scene was presented to the Grand Jury.

6. Sergeant Folendorf and Defendant arrived shortly thereafter. Sergeant Folendorf removed a portable protective shield from her squad car and directed Defendant to ready a shotgun specially designed to fire non-lethal beanbag rounds. Sergeant Folendorf retreated behind a building to call for additional assistance. Defendant positioned himself on the passenger side of Deputy Ramirez's squad car, put down the non-lethal shotgun and drew his service sidearm.

7. As negotiation continued, Mr. Evans again moved so that the muzzle of the gun held to his head was aligned in the direction of the deputies near Deputy Ramirez's squad car, so that a fired bullet traveling through or past the head, if not deflected or spent, would continue toward the officers. Defendant fired four rounds from his .45 caliber Glock handgun at Mr. Evans.

8. Mr. Evans slumped to the ground with his gun still held to his head. Deputies Ramirez and Ramos, Sergeant Folendorf and Defendant ran toward Mr. Evans. Mr. Evans lowered the hand holding the gun toward the ground with the muzzle oriented in the direction of the advancing officers. Defendant fired a second volley of three shots at Mr. Evans from his handgun. Deputy Ramirez reached Mr. Evans and kicked the gun from his hand. Mr. Evans was checked for additional weapons, handcuffed, rendered emergency medical assistance and taken by ambulance to a hospital.

9. Benjamin Evans was pronounced dead at the hospital. Autopsy determined the cause of death to be blood loss due to four gunshot wounds to the chest, abdomen and thigh. Toxicology analysis identified a postmortem blood alcohol concentration of .204 grams per deciliter.

10. Subsequent investigation revealed Mr. Evans was distraught on April 11, 2018 about the failure of a romantic relationship, had been drinking, was armed with a handgun, indicated an intent to commit suicide and wrote suicide notes.

11. Investigative materials regarding this incident, including police reports, witness statements, video and audio recordings, laboratory enhanced and synchronized audio/video recordings, reports of evidence seized from the shooting site and Mr. Evans' residence, photographs, medical records and autopsy reports, were forwarded to the Ramsey County Attorney's Office, as the appointed conflict prosecuting authority, for assessment of criminal charges. Assistant Ramsey County Attorney Richard Dusterhoft, Director of the Criminal Division, managed the file.

12. A Washington County Grand Jury was convened on July 18-19, 2019. The facts as herein found were presented through the testimony and recorded statements of noted witnesses, and exhibits.

13. In a recorded statement played to the Grand Jury, Defendant stated Mr. Evans turned his head "further than it has in the past to where his it's for sure at me and I felt that it was even past me and at Ramos so I fired um I just fired." Defendant stated Mr. Evans "kinda goes limp and falls over" but still had the gun to his head as officers

ran toward him. Mr. Evans did not comply with commands to drop his gun and "the gun falls out and we're kinda like you know around him. The gun falls out and is now starting to point to my other partner so then I fire again at him."

14. Jeff Noble, a retired police officer, licensed attorney and police practices consultant, testified as an expert witness before the Grand Jury.[4] Mr. Noble defined the legal use of force standard as whether "a hypothetical reasonable officer who has the exact same information as the officer who used force" would have believed there was an immediate deadly threat which justified the use of deadly force. Based upon review of the investigative file, Mr. Noble opined the first round of shots fired by Defendant was objectively unreasonable, inconsistent with generally accepted police practices, because the officers did not use protective cover to minimize the risk and no warning was issued to Mr. Evans that continued movement of his head and gun would result in use of deadly force against him. Mr. Nobles opined the second volley fired by Defendant was "not justified" because the risk was unreasonably increased by the officers leaving cover and advancing on Mr. Evans while he was still armed.

15. A written report dated June 9, 2019 authored by Stuart Robinson, a retired police officer, peace officer trainer and police practices expert, was received into evidence before the Grand Jury, identified by counsel as an "expert opinion," and portions were read into the record. Mr. Robinson defined the legal use of force standard as permitting law enforcement officers to use "objectively reasonable" deadly and non-deadly force "when confronted with people and situations that endanger them and others around them." Based upon review of the investigative file, Mr. Robinson opined it was not reasonable to consider a bullet fired into Mr. Evans' head when aligned with officers as sufficiently dangerous to the officers to justify the initial police use of deadly force and that Defendant failed to maintain sufficient distance and use protective cover to mitigate the risk. Mr. Robinson opined that the second volley fired by Defendant was caused by Defendant's unsafe approach of Mr. Evans while the gun was still in his hand. Mr. Robinson opined that Defendant's actions violated Minnesota law, specifically Minn. Stat. 609.066 regarding Authorized Use of Deadly Force by a Peace Officer.

16. In December, 2018, Mr. Dusterhoft consulted with then Ramsey County Chief Deputy Sheriff (currently Prior Lake Police Chief) Steven Frazer regarding the appropriateness of the police conduct during this incident, including supervision at the scene and use of force. Chief Frazer is a currently licensed Minnesota peace officer, police trainer and instructor, has testified as an expert witness regarding police practices and has been consulted by the Ramsey County Attorney's Office and Mr. Dusterhoft regarding police practices on multiple occasions. Mr. Dusterhoft forwarded police reports and video recordings to Chief Frazer for review, viewed portions of video recordings simultaneously with Chief Frazer and discussed the file in detail on five or six occasions with Chief Frazer. Mr. Dusterhoft and Chief Frazer specifically discussed the use of concealment and cover by the officers, the choice by

[4] Mr. Noble issued a written report, dated April 17, 2019 and received as Omnibus Hearing Exhibit 8. Because it was not introduced into evidence before the Grand Jury, it is not considered as part of the record proffered to support the indictment. *State v. Eibensteiner,* 690 N.W.2d 140 (Minn. App. 2004).

Defendant to advance on Mr. Evans after the first volley while Mr. Evans was still armed and whether the sergeant on the scene managed police activity during the incident appropriately. Chief Frazer opined to Mr. Dusterhoft the supervision of law enforcement officers at the scene was professionally appropriate, and the use of lethal force by Defendant was reasonable and appropriate. Chief Frazer was not retained as an expert or asked to render a written opinion, and his opinions were not conveyed to the later-convened Grand Jury.

17. The Grand Jury was instructed its responsibility was to "hear witnesses and receive evidence as to the possible charging of a crime by the State and to determine whether or not, based on such evidence, the person so charged should be brought to trial on that charge" (Grand Jury Transcript[5], p. 4); its "purpose is to hear evidence and make a decision to charge or not to charge" (p. 20); its options included declination of charges or return of an indictment (p. 248-250); an indictment may be found "if the evidence establishes probable cause to believe an offense has been committed and the defendant committed it," (p. 13), defining probable cause as "a reasonable cause or an apparent state of facts found to exist after reasonable inquiry, which would induce a reasonably intelligent and prudent person to believe that the accused person has committed the crime charged" (p. 244); it was the sole judge of the credibility of witnesses (p. 21-22 and 242-243); the elements of Manslaughter in the Second Degree were defined (p. 244-246) as was Authorized Use of Force by a Peace Officer (p. 246-248). The Grand Jury was not instructed that Mr. Evans' actions may have constituted defined violations of the criminal law specifically justifying his arrest.

18. On July 19, 2019, the Grand Jury returned an Indictment against Brian Jeffrey Krook charging Manslaughter in the Second Degree, in violation of Minn. Stat. 609.205(1), alleging on April 12, 2018 Defendant Brian Jeffrey Krook caused the death of Benjamin William Evans by culpable negligence, creating an unreasonable risk, and consciously took the chance of causing death or great bodily harm to another.

19. Defendant has moved to dismiss the Indictment 1) "in accordance with Rule 11.04, M.R.Crim.P.," understood to be a Probable Cause Motion per Minn. R. Crim. P. 11.04(a); 2) because "the factual basis of the Indictment is flawed," claiming evidence admissible before the Grand Jury was not sufficient to establish the offense charged per Minn. R. Crim. P. 17.06, subd. 2(1)(a) and, per Minn. R. Crim. P. 17.06, subd. 2(2)(c), the instructions given were "invalid"; 3) because "the charge is factually unsustainable" in that the decedent was "at fault," again understood to be a motion per Minn. R. Crim. P. 17.06, subd. 2(1)(a), claiming evidence admissible before the

[5] No motion was filed for disclosure of the verbatim record of the Grand Jury proceeding per Minn. R. Crim. P. 18.04, which vests discretion in the trial court, *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017), to order disclosure upon good cause shown. *Boitnott v. State,* 640 N.W.2d 626, 630-631 (Minn. 2002). At the request of the prosecutors, upon assertion of good cause related to trial preparation, an order filed July 24, 2019 authorized disclosure of the transcript of the entire Grand Jury proceeding to the State, and subsequent disclosure by the State to Defendant as a matter of trial discovery. Upon express inquiry by the court on the record at the Rule 19.04 First Appearance, the prosecutors asserted disclosure of both testimonial and non-testimonial portions of the Grand Jury proceeding was necessary for good cause. The transcript was received by stipulation as Omnibus Hearing Exhibit 1.

Grand Jury was not sufficient to establish the offense charged; 4) due to failure to present exculpatory evidence to the Grand Jury, understood to be a motion per Minn. R. Crim. P. 17.06, subd. 2(1)(e) that the indictment was not found or returned as required by law; and 5) to disqualify the Ramsey County Attorney and the Ramsey County Attorney's Office "from prosecuting this case." [6]

CONCLUSIONS OF LAW

The Grand Jury Indictment Was Found and Returned as Required by Law

Defendant Brian Jeffrey Krook has filed an amalgam of motions challenging the Indictment returned by a Washington County Grand Jury charging him with the offense of Manslaughter in the Second Degree, in violation of Minn. Stat. 609.205(1), alleging he was culpably negligent in causing the death of Benjamin William Evans on April 12, 2018. Initially styled a Probable Cause Motion per Minn. R. Crim. P. 11.04(a), the request for relief was recast in later briefing as a series of claims per Minn. R. Crim. P. 17.06, subd. 2. A grand jury proceeding is not a trial on the merits, and grand jurors do not determine guilt or innocence, but determine if there is probable cause to believe the accused has committed the crime. *State v. Inthavong,* 402 N.W.2d 799, 801 (Minn. 1987). A presumption of regularity attaches to the indictment and it is a rare case where an indictment will be invalidated. *Id.* Because of this presumption, a criminal defendant bears a heavy burden when seeking to overturn an indictment. *State v. Scruggs,* 421 N.W.2d 707, 717 (Minn.1988). In Minnesota, "[o]ur guiding principle in a challenge to an indictment is 'an indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for a trial of the charge on the merits.'" *State v. Robinson,* 604 N.W.2d 355, 365, (Minn. 2000), citing *Costello v. United States,* 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397 (1956).

[6] Discovery motions were also filed. With the exception of the State's Motion for *In Camera* Inspection, which is addressed by separate order, discovery disputes were resolved by agreement.

1. Evidence Admissible Before the Grand Jury Was Sufficient to Establish the Offense Charged per Minn. R. Crim. P. 17.06, subd. 2(1)(a)

A defendant may properly challenge an indictment on the ground that the "evidence admissible before the grand jury was not sufficient to establish the offense charged . . ." Minn. R. Crim. P. 17.06, subd. 2(1)(a). Although the rule does not expressly describe such a claim as a probable-cause challenge, an attack on the sufficiency of the evidence "to establish the offense charged" is essentially an argument that no probable cause supports the indictment. *State v. Flicek,* 657 N.W.2d 592 (Minn. App. 2003). The "grand jury may find an indictment when upon all of the evidence there is probable cause to believe that an offense has been committed and the defendant committed it." Minn. R. Crim. P. 18.05, subd. 2. Because the gravamen of a Rule 17 challenge to probable cause is a claim that admissible evidence considered by the grand jury was insufficient to establish the charged offense, Rule 11.04(a), which expressly applies to assessment of probable cause supporting charges filed by complaint and permits examination of extrinsic evidence, does not apply. *State v. Eibensteiner,* 690 N.W.2d 104 (Minn. App. 2004). Thus the record before the grand jury, and that record only, is considered to determine whether an indictment is supported by probable cause. The test of probable cause "is whether the evidence worthy of consideration . . . brings the charge against the prisoner within reasonable probability." *State v. Steinbuch,* 514 N.W.2d 796, 797-98 (Minn. 1994).

Here, the Indictment charges Manslaughter in the Second Degree, Minn. Stat. 609.205(1), alleging that on April 12, 2018 Defendant caused the death of Benjamin William Evans by culpable negligence. The elements of the offense are that Defendant caused the death of Benjamin Evans on April 12, 2018 in Washington County, Minnesota by culpable

negligence, that is, he created an unreasonable risk and consciously took a chance of causing death or great bodily harm by intentional conduct that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others. To cause means to be a substantial causal factor in causing the death. Defendant is not criminally liable if a superseding cause caused the death, that is, action that came after defendant's acts altered the natural sequence of events and produced a result that would not otherwise have occurred.

The Grand Jury was so instructed by use of an enhanced model jury instruction,[7] (Grand Jury transcript, p. 244-246), use of which is encouraged by the Supreme Court. *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991). The Grand Jury was also instructed by use of an altered model instruction,[8] (p. 246-248) that no crime is committed and a peace officer's use of deadly force is justified when necessary to protect the officer or another from apparent death or great bodily harm, to arrest a person the officer knows has committed a felony involving threatened use of deadly force or to arrest a person the officer knows has committed a felony and whom the officer reasonably believes will cause death or great bodily harm if apprehension is delayed.

The evidence in the record before the Grand Jury contains probable cause to support the indicted charge of Manslaughter in the Second Degree. The record indicates Defendant caused the death of Benjamin Evans on April 12, 2018 in Washington County, Minnesota by

[7] The instruction read to the Grand Jury included all of CRIMJIG 11.56, defining the elements of Manslaughter in the Second Degree, plus additional language defining culpable negligence as found in *State v. Frost,* 342 N.W.2d 317, 320 (Minn. 1983). *See 10 Minn. Dist. Judges Ass'n, Minnesota Practice,* CRIMJIG 11.56 (2018).

[8] The instruction read to the Grand Jury included most of CRIMJIG 7.11, describing authorized use of deadly force by peace officers, altered by deletion of "in effecting an arrest" at the time force was used, and adding language indicating reasonableness is judged "without the benefit of hindsight" and objectively "in light of the totality and facts and circumstances confronting the officer without regard to the officer's own state of mind, intention or motivation." *Compare 10 Minn. Dist. Judges Ass'n, Minnesota Practice,* CRIMJIG 7.11 (2018). The alteration is not challenged.

intentionally shooting him multiple times at close range, conduct a reasonable person would recognize as involving a strong possibility of death. No legally recognizable superseding cause of death is documented. There is evidence in the record upon which the Grand Jury could conclude Defendant's conduct was culpably negligent, that is, he created an unreasonable risk and consciously took a chance of causing death or great bodily harm by exposing himself to the danger presented by Mr. Evans by failing to take cover and by advancing on him while he was still armed. There is also evidence supporting the conclusion that Defendant's actions as a peace officer were not authorized by law because his perception of the danger presented was not reasonable and the danger was created by his own negligence. Defendant's claim that his actions were reasonable and justified was presented to the Grand Jury through his statement and corroborating detail supplied by other officers. While Defendant disagrees with the Grand Jury's assessment of reasonableness, the evidence in the record "worthy of consideration . . . brings the charge against the prisoner within reasonable probability," and thus there is probable cause to support the charge.

In a related argument incorporating Minn. R. Crim. P. 17.06, subd. 2(2)(c), Defendant claims the Grand Jury was improperly instructed, and that "invalid" instruction caused the Grand Jury to incorrectly find probable cause. Defendant claims the instructions were deficient because they did not inform the Grand Jury of the effect of Mr. Evan's claimed negligence upon the responsibility of Defendant. Criminal culpable negligence does not depend on the tort-law concept of a "breach of duty," but instead requires the State to prove defendant acted with gross negligence (objective test) and acted in conscious disregard of the risk created by his conduct (subjective test). *State v. King*, 367 N.W.2d 599, 603 (Minn. App. 1985). Under the objective test, a person acts with gross negligence through a "gross

deviation from the standard of care that a reasonable person would observe in the actor's situation." *State v. Zupetz*, 322 N.W.2d 730, 733 (Minn. 1982). Under the subjective "recklessness" test, a person consciously disregards a substantial and unjustifiable risk. *State v. Frost*, 342 N.W.2d 317, 319 (Minn. 1983). As noted, the Grand Jury was instructed by use of an enhanced model jury instruction pertaining to the indicted offense which incorporated both the required objective and subjective elements. The Grand Jury was also instructed regarding causation, including superseding cause. This is a correct recitation of the law. The Grand Jury was properly instructed.[9]

2. "Exonerating" "Exculpatory" Evidence was not Excluded from the Grand Jury Proceeding

The grand jury is a creation of common law, the basic purpose of which was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes, "convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." *Costello v. United States,* 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956). Adopted federally in the Bill of Rights, the Fifth Amendment of the United States Constitution guarantees "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." In recognition that the grand jury proceeding is "other than a constituent element of a 'criminal prosecutio[n]'" as protected by Sixth Amendment-guaranteed trial rights, the United States Supreme Court has held certain constitutional protections afforded defendants in criminal proceedings

[9] Defendant cites district court instructions in an unrelated case as support for his claim the Grand Jury should have been instructed that Mr. Evans was committing criminal offenses that justified his arrest, thus authorizing use of force to effect his arrest. Not only are the cited instructions not precedential, they are subject to challenge. Additionally, there is no evidence in the Grand Jury record that Defendant used lethal force to effect an arrest. His statement indicates lethal force was used to protect himself or another from apparent death or great bodily harm.

have no application before the grand jury. *United States v. Williams,* 504 U.S. 36, 49, 112 S.Ct. 1735, 1743, 118 L.Ed. 352 (1992). Expressly, there is no federal constitutional right to presentation of exculpatory evidence to the grand jury, notwithstanding the fact that the evidence is known to the government and defendant is constitutionally entitled to disclosure of that evidence during the trial procedure as a matter of due process of law, that is, the evidence is *Brady* material. *Id.*, citing *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "An indictment returned by a legally constituted and unbiased grand jury … if valid on its face, is enough to call for trial of the charge on the merits." *Costello,* 350 U.S. at 363.[10]

The Fifth Amendment Grand Jury Clause has not been incorporated in the Due Process Clause of the Fourteenth Amendment, and thus is not applicable to the States. *Branzburg v. Hayes,* 408 U.S. 665, 688 n. 25, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (citing *Hurtado v. California,* 110 U.S. 516, 534–35, 4 S.Ct. 111, 28 L.Ed. 232 (1884)). Each state, as an independent sovereign, is empowered to adopt the grand jury as an accusatory[11] body, and to establish by constitutional provision, statute, procedural rule or court decision the processes and standards the state grand jury and its legal advisors must follow.[12] Minnesota has done so. First by statute, Minn. Pub. Stat. ch. 104 (1858), then by court rule and complementary statute, Minn. R. Crim. P. 18 (adopted Feb. 26, 1975, eff. July 1, 1975); Minn. Stat. Ch. 630 (1971), Minnesota criminal procedure has incorporated the grand jury in the charging process. Initially, all public offenses were chargeable by grand jury indictment

[10] For a discussion of the federal *Costello* rule, *see* 4 Wayne R. LaFave, et al., *Criminal Procedure* §15.5 (4th ed.2019 update); Beale & Bryson, *Grand Jury Law and Practice* §9:1 (2d ed.2019 update).

[11] The investigatory grand jury, also a creation of the common law, is not at issue here. *See* Beale & Bryson, *Grand Jury Law and Practice* §1:7 (2d ed.2019 update). *See also In Re: Grand Jury of Wabasha County,* 309 Minn. 148, 244 N.W.2d 253 (1976); *In Re: Grand Jury of Hennepin County,* 271 N.W.2d 817 (Minn. 1978).

[12] For a review of state grand jury provisions, see 4 Wayne R. LaFave, et al., *Criminal Procedure* §15.1(d)-(g) (4th ed.2019 update).

only. Minn. Pub. Stat. ch. 104 §29 (1858). Currently, charging by grand jury indictment is permitted for all offenses, and required for offenses punishable by life imprisonment. Minn. R. Crim. P. 17.01, subd. 1.

The Minnesota accusatory grand jury has always been required to act on competent evidence. Only "legal evidence, and the best evidence in degree, to the exclusion of hearsay, or secondary evidence, except when such evidence would be admissible on the trial of the accused," Minn. Pub. Stat. ch. 104 §36 (1858); Rev. Laws §5280 (1905); Mason's Minn. Stat. §10622 (1927); Minn. Stat. 628.59 (1965), or in somewhat more modern parlance, evidence that would be admissible at trial except hearsay to lay foundation, certain identified out-of-court statements and investigating officer summaries of evidence that will be available and admissible at trial, Minn. R. Crim. P. 18.05, may support an indictment. However, a grand jury proceeding is not a trial on the merits, and grand jurors do not determine guilt or innocence, but determine if there is probable cause to believe the accused has committed the crime. *State v. Inthavong,* 402 N.W.2d 799, 801 (Minn. 1987). Thus, a grand jury target has never had the right to present a defense in the grand jury proceeding. "The grand-jury is not bound to hear evidence for the defendant; . . ." Minn. Pub. Stat. ch. 104 §37 (1858); Rev. Laws §5280 (1905); Mason's Minn. Stat. §10622 (1927); Minn. Stat. 628.59 (1965), even when a prior grand jury declined to indict after hearing defense evidence. *State v. Lane*, 195 Minn. 587, 263 N.W. 608 (1935). A defendant has no right to testify before the grand jury, *State v. Morrow,* 834 N.W.2d 715 (Minn. 2013), to a suppression hearing before the grand jury meets to seek exclusion of evidence, *State v. Terrell*, 283 N.W.2d 529 (Minn. 1979), or to the presentation of evidence to the grand jury supporting his theory of the case. *State v. Olkon,* 299 N.W.2d 89 (Minn. 1980). There is no requirement that the grand jury be instructed on affirmative defenses to the charged crime, *State v. Penkaty*, 708 N.W.2d 185, 196-197

(Minn. 2006) (self-defense), or that defendant may lack criminal responsibility due to mental illness. *State v. Wollan,* 303 N.W.2d 253, 255 (Minn. 1981).

However, the grand jury is not simply an instrument of the prosecution. To fulfill its independent roles as a "shield" between the government and the accused, and a "sword" probing into the evidence of a crime, *see* Beale & Bryson, *Grand Jury Law and Practice,* §1 (2d ed.2019 update), the Minnesota grand jury has always had the duty to assess the evidence necessary to make a fair decision regarding indictment. Initially, the grand jury was expressly empowered to seek out evidence that "will explain away the charge" and to "order such evidence to be produced" by requiring the prosecuting attorney to procure "the witnesses." Minn. Pub. Stat. ch. 104 §37 (1858); Rev. Laws §5280 (1905); Mason's Minn. Stat. §10622 (1927); Minn. Stat. 628.59 (1965). Currently, as a general rule, a prosecutor should honor grand jury requests for additional evidence. *State v. Wollan,* 303 N.W.2d 253, 255 (Minn. 1981). "A prosecutor should not knowingly withhold evidence from the grand jury which would tend to substantially negate a suspect's guilt." *State v. Roan*, 532 N.W.2d 563, 570 (Minn. 1995). Exclusion of evidence favorable to defendant will not invalidate an indictment unless it would have "materially affected the grand jury determination." *State v. Olkon,* 299 N.W.2d 89, 106 (Minn. 1980); *State v. Moore,* 438 N.W.2d 101, 104–05 (Minn. 1989).

Though loosely termed "exculpatory evidence" and not specifically defined in the Minnesota grand jury context, *see e.g., Moore,* 438 N.W. 2d at 104-105; *Roan,* 532 N.W.2d. at 570, it is clear "evidence which would tend to substantially negate a suspect's guilt," is not synonymous with *Brady* evidence. Grounded in Sixth Amendment and Minnesota Constitutional guarantees of due process of law during the trial process, *Brady* and progeny prohibit willful or inadvertent suppression of material exculpatory or impeaching evidence

favorable to the accused, which results in prejudice. *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L.Ed.2d 286 (1999); *State v. Hunt,* 615 N.W.2d 294, 299 (Minn. 2000). Assessment of grand jury evidence is grounded in statute, rule and precedent defining the function of the grand jury and proscribing prosecutorial misconduct which may impair grand jury independence. Because exclusion is harmless unless it would materially affect the grand jury determination, evidence tending to "substantially negate" a suspect's guilt is more akin to evidence which "will explain away the charge" as provided in the early Minnesota grand jury statutes than it is to *Brady* evidence. Other states with similar grand jury jurisprudence define such evidence as that which "clearly negates guilt," "objectively refutes … the state's evidence," "greatly undermines the credibility of evidence likely to affect the grand jury's decision to indict," would "be of such weight … [as to] deter the grand jury from finding probable cause," or "would preclude issuing an indictment." 4 Wayne R. LaFave, et al., *Criminal Procedure* §15.7(f) (4th ed.2019 update) and cases annotated therein. While Minnesota "exculpatory" grand jury evidence may be something less than that which would present a complete defense to the charge, considering the grand jury probable cause charging function and the fact that the grand jury is not required to consider affirmative defenses, to be exculpatory the evidence must be more than simply defendant's alternative theory of the case. And unless exclusion materially affected the decision to indict, failure to present to the grand jury what may certainly be *Brady* evidence in the trial context will not invalidate an indictment.

Here, Defendant claims the indictment is "flawed" because the prosecutors knowingly kept what he deems "exonerating" "exculpatory" expert opinion evidence from the Grand Jury. He makes no claim the factual information presented to the Grand Jury was false, incomplete or misleading, but argues the indictment is invalid because the Grand Jury

heard only expert opinion declaring his actions unreasonable and in violation of Minnesota law regarding authorized peace officer use of deadly force when a contrary expert opinion declaring his actions reasonable and appropriate was known to the prosecutors and suppressed. If the prosecuting attorneys had chosen to present no expert opinion testimony, charging the Grand Jury to assess the reasonableness of Defendant's conduct and decide whether there was probable cause to conclude he was culpably negligent after proper instruction, Defendant's challenge to the exclusion of a supportive expert opinion would fail as a claimed right to present an affirmative defense. However, the prosecutors chose to present two expert opinions that Defendant's conduct was unreasonable and not to present the contrary opinion.[13] Thus, the question is whether the excluded evidence was exculpatory in that its exclusion materially affected the grand jury determination, rendering the indictment invalid.

While it is possible to conceive of the situation where expert opinion evidence could clearly negate guilt precluding the issuance of an indictment --- DNA evidence not commonly knowable which statistically excludes a defendant as a suspect, perhaps --- this is not that case. Negligence is a fact question, quintessentially a jury question regarding reasonableness, *Domagala v. Roland,* 805 N.W.2d 14 (Minn. 2011), which may be assessed

[13] The State argues vociferously that because it did not formally retain Chief Frazer as an expert witness, his testimony was not available for presentation to the Grand Jury. Putting aside the suggestion that unavailability was intentionally procured by a prosecutor, the State was in possession of a comprehensive opinion by Chief Frazer which reached conclusions different from those presented to the Grand Jury. Mr. Dusterhoft's implausible testimony to the contrary is not credible. Though it could have chosen to present no expert testimony and to rely on the Grand Jury's assessment of reasonableness, the State chose to use expert opinion testimony to bolster its probable cause presentation. As noted in an analogous *Brady* context which is instructive here, the State then had an "inescapable" duty not to mislead the Grand Jury by ignoring evidence favorable to Defendant, *State v. Williams,* 593 N.W.2d 227, 235 (Minn. 1999), as the Ramsey County Attorney's Office had every reason to know. The claim that Chief Frazer could not be qualified as an expert witness is unpersuasive. At a bare minimum, nothing prevented inquiry of the expert who did testify regarding "opposite opinions" and how that might impact the testifying expert's opinion, as the State attempted to do in examination of Chief Frazer at the Omnibus Hearing. OH transcript, p. 87.

without the aid of expert testimony, *Tiemann v. Independent School Dist. #740*, 331 N.W.2d 250 (Minn. 1983), including by a grand jury. *State v. Plummer,* 511 N.W.2d 36 (Minn. App. 1994). Further, the fact-finder in a criminal proceeding is not bound by expert opinion testimony regarding questions of fact, and may reject it entirely, even when the only experts who testify support a contrary conclusion. *State v. Roberts,* 876 N.W.2d 863 (Minn. 2016). Admission of even inadmissible expert testimony, claimed to override otherwise insufficient lay testimony, does not require dismissal of an indictment if the grand jury heard sufficient admissible evidence to establish probable cause. *State v. Jackson,* 770 N.W.2d 470, 485 (Minn. 2009).

Here, the Grand Jury heard and saw the same evidence the experts did; had been told the legal standard to apply was whether "a hypothetical reasonable officer who has the exact same information as the officer who used force" would have believed there was an immediate deadly threat which justified the use of deadly force; was able to assess the danger presented and the options available; was instructed regarding Minnesota law defining the charge and governing authorized use of deadly force by a peace officer; and knew that of the five officers potentially in the line of fire when the first volley was fired, and of the four officers advancing on Mr. Evans after the first volley, only Defendant used lethal force. It is inexcusable the contrary expert opinion was not presented to the Grand Jury, and its exclusion was knowing prosecutorial misconduct. However, contrary to Defendant's assertion, prosecutorial misconduct is not an automatic ground for dismissal of an indictment, but must be considered in the context of whether the misconduct "substantially influenced the Grand Jury's decision to indict" so that there is "grave doubt that the decision to indict was free of any influence of the misconduct." *State v. Smith,* 876 N.W.2d 310, 323 (Minn. 2016), citing *State v. Montanaro,* 463 N.W.2d 281 (Minn. 1990). The

misconduct here was not compounded by the presentation of an argumentative closing statement, *State v. Taylor,* 650 N.W.2d 190, 199-200 (Minn. 2002), and Grand Juror questions were permitted and addressed. It cannot be concluded on this record that the suppressed opinion was "exonerating" or "exculpatory" in that its exclusion materially affected the grand jury determination, rendering the indictment invalid. While the conduct of the prosecuting attorneys is troubling, there is no "grave doubt" that this indictment is the product not of independently found probable cause but of prosecutorial overreaching. The admissible evidence heard by the Grand Jury establishes probable cause to support the charge, and it is appropriate to require Defendant to stand trial on that charge.

Disqualification of the Prosecuting Authority is not Appropriate

Defendant has moved to disqualify the Ramsey County Attorney's Office as the prosecuting authority in this case on the sole ground that continued representation would violate the "advocate-witness rule" of the Minnesota Rules of Professional Conduct. The current rule provides "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . ." however, "[a] lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so [by conflict of interest rules]." Minn. R. Prof. Cond. 3.7(a) and (b). The challenge here involves Richard Dusterhoft,[14] who is not identified as one of the attorneys which will represent the State at trial, but is claimed to be a member of the "firm" at which the trial attorneys practice, the Ramsey County Attorney's Office. Neither party addressed whether the government legal department at issue here is a "firm," or whether all members of the department would be disqualified by the advocate-witness rule, *see*

[14] Defendant's argument cites inapposite *Brady* standards while asserting "the conflict isn't narrowed to Mr. Dusterhoft." The argument is not well founded.

Humphrey on Behalf of State v. McLaren, 402 N.W.2d 535, 542-543 (Minn. 1987), but in light of Mr. Dusterhoft's testimony he is the director of the criminal division and supervises the adult trial division of the Ramsey County Attorney's Office, it is assumed the lawyers involved here are members of a firm for Rule 3.7 analysis. Thus, the issue presented is not whether Mr. Dusterhoft would be disqualified as an advocate in this case, but whether the entire Ramsey County Attorney's Office is disqualified by Mr. Dusterhoft's circumstances.

There is significant question regarding whether Mr. Dusterhoft could be called as a witness in the trial of this case. The proffered evidentiary basis for his testimony is unclear, and "[s]imply to assert that an attorney will be called as a witness, a too-frequent trial tactic, is not enough [to raise an advocate-witness rule issue]." *Humphrey on Behalf of State v. McLaren,* 402 N.W.2d at 541. To be disqualified, the rule provides the attorney must be a "necessary witness," his testimony not "merely cumulative, or quite peripheral, or already contained in a document admissible as an exhibit[.]" *Id.* Defendant has failed to demonstrate Mr. Dusterhoft would be a necessary witness at trial.

Assuming *arguendo* that he could be called, Defendant has identified no conflict of interest which would disqualify Mr. Dusterhoft's office from further prosecution of this case. Rule 3.7 specifically provides disqualification is required only when Minn. R. Prof. Cond. 1.7, regarding current clients, or Rule 1.9, regarding former clients, identifies a conflict of interest. Rule 1.7 defines a current conflict of interest as when representation of one client will be directly adverse to another client or when there is a significant risk that the representation of one or more clients will be materially limited by responsibilities to another client, a third party or a personal interest. Rule 1.9 defines a conflict of interest regarding a former client as representation of an adverse party in the same or related litigation, and use

or revelation of information gained during representation to the disadvantage of a former client. Defendant makes no attempt to apply the specifics of the rules to this case.

Interpreting a predecessor rule which did not include the express provisions governing disqualification of other attorneys, the Supreme Court alluded to the central purpose of the advocate-witness rule in criminal cases as fairness, citing with approval the holding that defendant must "establish that the role of the prosecutor as a witness would infringe upon the defendant's right to a fair trial" to succeed on a motion to disqualify. *State v. Fratzke*, 325 N.W.2d 10, 13 (Minn. 1982). Defendant makes no attempt to explain how he would be deprived of a fair trial if he is permitted to call Mr. Dusterhoft at trial to challenge an anticipated attempt by the State to impeach his expert witness. In fact, the relief Defendant requests: "Another County Attorney should review this case. It should not have been charged." *Defendant's Memorandum in Support of his Motions to Dismiss and Disqualify,* January 6, 2020, p. 28, suggests Defendant's concern has nothing to do with his right to a fair trial and everything to do with his belief he is unfairly charged. He has failed to demonstrate disqualification of the Ramsey County Attorney's Office based upon application of the ethical advocate-witness rules is justified in this case.

NOW, THEREFORE, IT IS ORDERED:

1. Defendant Brian Jeffrey Krook's motion to dismiss the Indictment per Minn. R. Crim. P. 11.04(a) is **DENIED.**

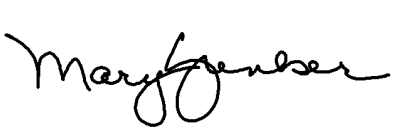
2. Defendant Brian Jeffrey Krook's motion to dismiss the Indictment per Minn. R. Crim. P. 17.06, subd. 2(1)(a) and Minn. R. Crim. P. 17.06, subd. 2(2)(c) for lack of probable cause is **DENIED.**

3. Defendant Brian Jeffrey Krook's motion to dismiss the Indictment per Minn. R. Crim. P. 17.06, subd. 2(1)(e) for failure to present exculpatory evidence is **DENIED.**

4. Defendant Brian Jeffrey Krook's motion to disqualify the Ramsey County Attorney and the Ramsey County Attorney's Office from prosecuting this case is **DENIED.**

IT IS SO ORDERED.

BY THE COURT:



Dated: February 18, 2020

Honorable Mary A. Yunker
Judge of District Court